

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

77-4034

In The
UNITED STATES COURT OF APPEALS -
FOR THE SECOND CIRCUIT

No. 77-4034

CONTINENTAL STOCK TRANSFER & TRUST
COMPANY (A Limited Purpose Trust
Company) and GENERAL STOCK TRANSFER
COMPANY,

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition to Review Order of the
Securities and Exchange Commission

REPLY BRIEF FOR PETITIONERS

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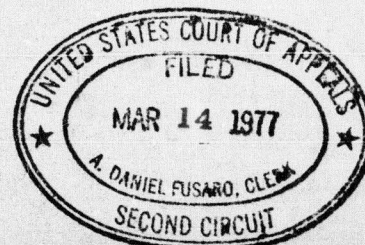


TABLE OF CONTENTS

	page
INTRODUCTION.....	2
ARGUMENT	
I. The failure of transfer agents other than Petitioners to object to public disclosure of comparable information is irrelevant to this case.....	2
II. The Commission erred in refusing to accord confidential treatment to, or otherwise limit public disclosure of, the subject information.....	3
1. The existence of publications such as the Financial Stock Guide Service Directory of Active Stocks ("FSGS") should not be used as a basis for denying confidential treatment to this information.....	3
2. Applicable standards mandate that the confidentiality of this information be maintained.....	5
III. Petitioners are not precluded from arguing that the Commission exceeded its authority or otherwise abused its discretion by requiring transfer agents to supply a list of all customers.....	8
CONCLUSION.....	9

TABLE OF CITATIONS

page

CASES:

<u>Charles River Park "A", Inc. v. HUD</u> , 519 F.2d 935 (D. C. Cir. 1975).....	5
<u>Continental Oil Co. v. FPC</u> , 519 F.2d 31 (5th Cir. 1975), <u>cert. denied</u> , U.S. 96 S. Ct. 2168, 48 L. Ed. 2d 794 (May 18, 1976).....	5, 7
<u>Evans v. Dept. of Transportation</u> , 446 F.2d 821 (5th Cir. 1971), <u>cert. denied</u> , 405 U.S. 918 (1972).....	7
<u>McKart v. United States</u> , 395 U.S. 185 (1969).....	9
<u>Neal-Cooper Grain Co. v. Kissinger</u> , 385 F. Supp. 769 (D.D.C. 1974).....	5
<u>Pennzoil Co. v. FPC</u> , 534 F.2d 627 (5th Cir. 1976).....	7
<u>SEC v. Chenery Corp.</u> , 318 U.S. 80 (1943).....	4
<u>USV Pharmaceutical Corp. v. Sec. of Health, Education & Welfare</u> , 466 F.2d 455 (D.C. Cir. 1972)...	4
<u>Westinghouse Electric Corp. v. Schlesinger</u> , 8 Empl. Prac. Dec. (CCH) ¶9716 (E.D. Va. 1974).....	5
<u>Wolff v. Selective Service Local Board No. 16</u> , 372 F.2d 817 (2nd Cir. 1967).....	9

STATUTES:

Freedom of Information Act, 5 U.S.C. §552 <u>et seq.</u> :	
5 U.S.C. §552(b)(4).....	5, 7
Securities Exchange Act of 1934, 15 U.S.C. §78a <u>et seq.</u> :	
Section 24(b), 15 U.S.C. §78x(b).....	6
Section 25(c)(1), 15 U.S.C. §78y(c)(1).....	8

SECURITIES AND EXCHANGE COMMISSION REGULATIONS AND RELEASES:

17 CFR 200.80(b)(4).....	6
17 CFR 200.80(c)(5).....	6
17 CFR 200.80(d)(6)(iv).....	6
17 CFR 240.17Ac2-1.....	8
17 CFR 249b.100 (Form TA-1).....	8
Release No. 34-11759 (October 22, 1975).....	8

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INTRODUCTION

This reply brief is submitted by Petitioners to respond to some points raised by the Securities and Exchange Commission (the "Commission") in its answering brief to the extent that they were not fully treated in Petitioners' Brief.

ARGUMENT

- I. The failure of transfer agents other than Petitioners to object to public disclosure of comparable information is irrelevant to this case.

The Commission (Res. Br. 11, 13) points to the fact that transfer agents other than Petitioners have filed comparable information without objection as a basis for the Commission's denial of confidential treatment to Petitioners' issuer lists. If Petitioners' rights would be violated by the public dissemination of this information, it is irrelevant that other unaffiliated entities have chosen to waive, or not to prosecute, comparable claims. Petitioners' rights must be determined without regard to the course of action pursued by other entities.

II. The Commission erred in refusing to accord confidential treatment to, or otherwise limit public disclosure of, the subject information.

1. The existence of publications such as the Financial Stock Guide Service Directory of Active Stocks ("FSGS") should not be used as a basis for denying confidential treatment to this information.

Without repeating their arguments on this point (Pet. Br. 15-17), Petitioners wish to make a few additional observations. The Commission's review of FSGS (Res. Br. 12-13) was a limited one; it determined merely how many of Petitioners' customers were listed in FSGS. The Commission's review ignored 45 errors where FSGS listed an issuer as having one of the Petitioners as its transfer agent, when in fact neither Petitioner is actively engaged as transfer agent for that issuer.* In addition, the Commission's review ignored the fact that issues of preferred stock, warrants and bonds for which Petitioners act as transfer agents would not be disclosed in FSGS. Consequently, FSGS is not 93% accurate, as the Commission implies (Res. Br.

* Petitioners compared their respective Schedules B, as updated through December 31, 1976, with the 1977 edition of FSGS. The Commission, on the other hand, apparently compared the Schedules B included in Petitioners' original 1975 filings with the 1976 edition of FSGS.

12-13). If each omission were considered an error and each incorrect transfer agency association were considered an error, FSGS's accuracy rate would be substantially less than 93%. In any event, Petitioners contend that even if FSGS had no errors or omissions, FSGS does not present the same information as the Petitioners' customer lists, since FSGS does not list or index customers by transfer agent. (Pet. Br. 15-16).

Of course, should the Court decide that the issue of FSGS' accuracy is determinative of this dispute, this Court should remand the matter to the Commission to make relevant findings of fact. The Commission has made no finding as to the accuracy of FSGS or any other comparable publication and its decision denying confidentiality cannot be based on a finding of fact which was never made. SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . There must be such a responsible finding."); USV Pharmaceutical Corp. v. Sec. of Health, Education & Welfare, 466 F.2d 455, 461-462 (D.C. Cir. 1972).

2. Applicable standards mandate that the confidentiality of this information be maintained.

The Commission states (Res. Br. 7, n. 10) that it agrees with Petitioners' contention that the applicable standard of review by the Court is whether the Commission action was arbitrary, capricious or a gross abuse of discretion. Except with respect to the second argument raised by Petitioners (Pet. Br. 23-27) and in the very limited circumstances discussed below, Petitioners have not stated and do not agree that such a standard of review is applicable here. Petitioners' position is clearly set forth in its brief.

The Commission (Res. Br. 15-16) also argues that even if the subject information comes within the 5 U.S.C. §552(b)(4) exemption from the Freedom of Information Act ("FOIA"), the Commission is still free to disclose it, citing Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). As noted in Petitioners' brief, the matter has not been settled (Pet. Br. 17-18). Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), cert. denied, ___ U.S. ___, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (May 18, 1976). See, also, Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 775 (D.D.C. 1974); Westinghouse Electric Corp. v. Schlesinger, 8 Empl. Prac. Dec. (CCH) ¶9716 (E.D. Va. 1974).

Moreover, the Commission is obligated by Section 24(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. §78x(b), and its own rules and regulations to maintain the confidentiality of this information (Pet. Br. 18-19). Section 24(b) precludes disclosure of information in contravention of the rules and regulations of the Commission adopted under the FOIA, which regulations generally preclude disclosure of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential". 17 CFR §200.80(b)(4). The Commission cannot argue (Res. Br. 18) that it is acting in accordance with its regulations and therefore not in violation of Section 24(b) merely by declaring that it does not choose to accord the information confidential treatment when such treatment is in fact required by such regulations.

The Commission's reliance (Res. Br. 18) on 17 CFR 200.80(c)(5) and 17 CFR 200.80(d)(6)(iv) is also misplaced. Both regulations, even if valid, come into play only in the event that the Commission receives a request from another party for disclosure of the subject information. Until such a request is received, the basic standards of 17 CFR 200.80(b)(4) govern and require that the confidentiality of the subject information be maintained. Indeed, since 17 CFR 200.80(d)(6)(iv), even if valid, hinges on the filing of an application which "shows good cause" why otherwise exempt information should be disclosed, that regulation cannot be relied on to support disclosure in the absence of such a showing.

Finally, even if the Commission does have some discretion to disclose this information in spite of the fact that it comes within the terms of 5 U.S.C. §552(b)(4) and the Commission's own regulations relating to confidentiality, a contention with which Petitioners strenuously disagree, it would be an abuse of this discretion for the Commission to disclose these customer lists in the form filed. As the Commission acknowledges (Res. Br. 15, n. 22), even if such discretion exists, an administrative agency must balance competing public and private interests prior to deciding whether to disclose such information. Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), cert. denied, ____ U.S. ____, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (May 18, 1976). See, also, Evans v. Dept. of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972). No substantial public purpose would be served by the disclosure of the identity of Petitioners' customers (Pet. Br. 19) and the Commission does not suggest otherwise. Moreover, not only is the potential harm to Petitioners' patent (Pet. Br. 8-9 and 13), there are alternatives to full disclosure (Pet. Br. 19). Just as Petitioners have challenged the Commission to cite a substantial public purpose for requiring Petitioners to include the names of their customers in their TA-1 filings (Pet. Br. 23-25), they challenge the Commission to cite a single private purpose for which a private party might wish

to examine the Schedules B to Petitioners' Forms TA-1 other than to raid their customers.

III. Petitioners are not precluded from arguing that the Commission exceeded its authority or otherwise abused its discretion by requiring transfer agents to supply a list of all customers.

The Commission argues (Res. Br. 11, n. 17) that the argument raised by Petitioners on pages 23 through 27 of Petitioners' Brief is not properly before the Court, citing Section 25(c)(1) of the Act, 15 U.S.C. § 78y(c)(1). Section 25(c)(1) states in applicable part that "[n]o objection. . . may be considered by the Court unless it was urged before the Commission or there was reasonable ground for failure to do so."

The Commission adopted Rule 17Ac2-1 (17 CFR 240.17Ac2-1) and related Form TA-1 (17 CFR 249b.100) under the Act on October 22, 1975 (Release No. 34-11759). During the course of its consideration of Form TA-1, the Commission apparently addressed itself to the issue of whether such lists should be required and decided not only that they should be required, but also that they should be made publicly available (R. 62, n. 20). Petitioners deemed it futile to argue the same point to the Commission barely 10 months after the

Commission had made its determination on the issue. Cf. McKart v. United States, 395 U.S. 185, 193 (1969) (The doctrine of exhaustion of administrative remedies is "subject to numerous exceptions."); Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 825 (2nd Cir. 1967) ("[W]e are most reluctant. . . to require appellants to proceed along the same futile path that others have trod before".). Because Petitioners felt it would be futile to raise the argument again and because they would have been satisfied, at that stage of the proceedings, to permit the Commission to retain the subject information as long as it was held in confidence, Petitioners assumed for the purposes of their argument before the Commission that the Commission did have authority to request the customer lists (R.16).*

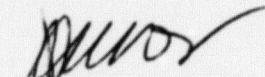
CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' Brief, Petitioners respectfully request that the Court set aside the Commission's December 17, 1976 order with instructions to the Commission to accord the subject

* In their letter to the Commission Secretary, dated September 18, 1975, commenting on proposed Form TA-1, Petitioners' counsel did, in fact, express the assumption that the customer lists of registrants would be accorded confidential treatment.

information confidential treatment, or alternatively, to find that the Commission exceeded its authority in requiring Petitioners to file such information with instructions that such information may therefore not remain in the Commission's files.

Respectfully submitted,



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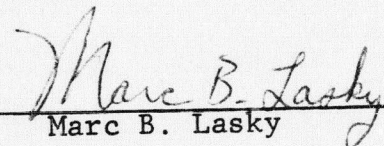
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The foregoing document has been served upon counsel for the Respondent by depositing copies of same enclosed in post-paid envelopes in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York. Said envelopes were addressed as follows:

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Dated: March 15, 1977